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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91115198
Party	Defendant BUILD-A-BEAR WORKSHOP, LLC
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THE VERMONT TEDDY BEAR
COMPANY, INC.,

Opposer,

V.

BUILD-A-BEAR WORKSHOP, INC.,

Applicant.

Opposition No. 115,198

REPLY IN SUPPORT OF APPLICANT'S MOTION FOR SUMMARY JUDGMENT

The question presented by BABW’s Summary Judgment Motion is: “Did VTB obtain any proprietary trademark rights in a three-dimensional heart design prior to February 13, 1998, the date of the BABW Application?”

BABW is entitled to judgment as a matter of law because the undisputed facts demonstrate that, prior to February 13, 1998, VTB only used a heart design as mere decoration for its bears—not as a trademark to identify source. VTB’s response fails to prove that summary judgment is not appropriate because: **(1)** VTB cannot show specific facts or evidence that its use of a heart design prior to February 13, 1998 was use *as a trademark*; **(2)** VTB cannot distinguish the *Wiley* case, which holds that BABW is entitled to judgment as a matter of law; and **(3)** VTB cannot create an issue of fact by arguing trademark rights based on the actions of BABW.

ARGUMENT and ANALYSIS

I. VTB's Response Does Not Contain Evidence of Use as a Trademark Prior to February 13, 1998

VTB must show that it obtained a proprietary trademark interest in a three-dimensional heart design by virtue of use *as a trademark* prior to February 13, 1998. While VTB’s response trumpets its alleged “conception” and use of a heart prior to BABW, VTB’s response does not address the undisputed fact that VTB only used a three-dimensional heart as mere ornamentation. No amount of this kind of use—even if prior to February 13, 1998—could confer any trademark rights. *Rock And Roll Hall of Fame and Museum, Inc. v. Gentile Productions*, 134 F.3d 749 (6th Cir. 1998); *Damn I’m Good, Inc. v. Hanover House Industries, Inc.*, 514 F.Supp. 1357 (S.D.N.Y. 1981).

The issue in this Motion is not *when* VTB used the mark, but *how* VTB used the mark. The dates of first use or “conception” do not affect the outcome of the motion when the alleged use is mere ornamentation. Thus, the alleged “issue” of a prior conception date is wholly irrelevant to the issue of ornamentation and should not be considered in determining whether VTB’s ornamental use conferred any trademark rights on VTB. *See Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

In making its case, BABW submitted several exhibits and legal citations demonstrating that VTB only used the heart as ornamentation. Faced with this evidence, VTB has the express duty under the Federal Rules to come forward with specific facts demonstrating trademark rights in a three-dimensional heart and, thus, that its use was not merely ornamental. Fed. R. Civ. P. 56(e) and *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)(citing Rule 56(e)). VTB failed to present such facts and therefore failed to meet its burden.

A. VTB Presents Inadmissible Legal Conclusions Rather Than Facts

VTB’s response states boldly that its use “goes well beyond mere ornamental or decorative use.” VTB’s evidence? None. Rather, VTB’s counsel makes the conclusory statement that:

“(p)lacement of the heart inside the chest of the teddy bear provides a clever, unique, imaginative and distinct impression in the minds of consumers that associates the mark with its source, Opposer, whose identity is found on a label affixed to the bear.”
(VTB Response, p. 17, subsection D).

There is no indication on the record that counsel is qualified to offer expert testimony on the issue of consumer perception and VTB presents no admissible evidence to support this opinion of the trademark significance. As such, VTB presented no admissible evidence demonstrating that its heart design is a trademark.

Moreover, while VTB cites the TMEP to outline the types of evidence that should be considered in making a determination on the issue of ornamentation, namely, (1) the commercial impression of the proposed mark; (2) the relevant practices in the trade; (3) secondary source; and (4) evidence of distinctiveness, VTB offers no evidence of any of the four factors. Rather VTB relies solely on its own conclusory characterization of the heart as “clever,” “unique”, and “imaginative.”

In fact, VTB does not dispute that its prior use of a heart on a necklace with its “Teddy & Theo”/MAFFL bears was merely ornamental use. Yet, VTB fails to demonstrate why its claimed heart design—an admitted

extension of an obviously ornamental use—can operate as a trademark to identify source of the bears. Because there is not a scintilla of evidence directed to the four ornamentation factors, VTB has failed to meet its burden.

B. VTB's Exhibits and Affidavits Do Not Show a Genuine Issue of Material Fact

Despite VTB's burden of proof and its ease of access to documents demonstrating VTB's use of a heart, VTB failed to produce any documentation or evidence of use of a heart *as a trademark* prior to February 13, 1998. VTB's "exhibits" and the affidavits are devoid of facts demonstrating use *as a trademark*. As such, VTB's complete failure of proof on an essential element of its case renders the issue of ornamentation appropriate for summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

1. VTB Exhibits Show Only Ornamental Use Before February 13, 1998

In an effort to simplify this matter, the VTB "exhibits" are delineated in a chart attached hereto as *BABW's Exhibit 16*. The chart succinctly shows that VTB has submitted no evidence showing use of a heart *as a trademark* by VTB prior to February 13, 1998. Further, the VTB "exhibits" are the same type of evidence that courts have rejected as insufficient to prove use as a trademark. *See S Industries, Inc. v. Diamond Multimedia Systems, Inc.*, 991 F.Supp. 1012, 45 USPQ2d 1705 (N.D. Ill. 1998)(rejecting "spreadsheets" of sales—like VTB's Exhibit 16; rejecting "advertising" in the form of catalogs—like VTB's Exhibit 4; rejecting self-serving and conclusory statements in affidavits—like those in the affidavits from Mr. Burns and Ms. Robert; rejecting internal memorandum—like VTB's Exhibit 3; and granting defendant's motion for summary judgment based on the failure of the "exhibits" to prove trademark use).

2. VTB Offers the Same Evidence of Use That the USPTO Rejected

VTB offers the following evidence to demonstrate its use of a three-dimensional heart prior to the BABW application: the "blueprint," the 1996 Holiday catalog, and representations of the three-dimensional heart that is placed in a bear. This is the same evidence of use rejected by the USPTO.

As a matter of review, the USPTO refused registration of VTB's application for a three-dimensional heart because the proposed mark was ornamental and failed to function as a trademark. In addition, the USPTO found the blueprint and the catalog "unacceptable as evidence of actual trademark use" and correctly noted that the proposed heart mark does not appear anywhere on the specimens. *See Exhibit 6 from BABW's Memorandum in Support of Summary Judgment*. Likewise, the USPTO issued a prospective rejection of a representative heart by

indicating that such a specimen would also “not be acceptable as evidence of actual trademark use” and “would not show the proposed mark as functioning as a trademark.” *Id.* While VTB tries to explain away the rejections of its evidence of alleged trademark use by the USPTO, the Examining Attorney consistently maintained her objection that VTB’s three-dimensional heart did not function as a trademark.

VTB does not dispute that the blueprint, the 1996 catalog, and the representations of the heart were rejected by the USPTO. VTB’s only response is that someday it will be able to produce evidence of use. Faced with BABW’s Motion for Summary Judgment, VTB was required to produce that evidence now. VTB has not.

3. Many VTB “Exhibits” Are Not Properly Authenticated And Should Not be Considered By the Board

VTB’s Response includes several attached “exhibits.” Under the Federal Rules and the TBMP, documentary evidence submitted in opposition to a motion for summary judgment must either (1) be specifically identified by affidavit and attached thereto per TBMP 528.05(b) or (2) consist of one of the recognized types of documentary evidence in TBMP 528.05(a) through 528.05(f).

TBMP § 528.05(c) and 37 CFR § 2.127(e)(2) require that VTB present “a copy of the request for production and the documents or things produced in response thereto.” VTB’s response impermissibly attempts to introduce documents as “exhibits” that (a) have never been produced to BABW, and (b) do not include a copy of the request made for such documents.¹ Thus, BABW requests that the Board take these procedural deficiencies into consideration when examining VTB’s alleged proof of use.²

4. VTB’s Affidavits Are Insufficient and Do Not Constitute Specific Facts Demonstrating Non-Ornamental, Trademark Use of a Heart Design.

Both Rule 56(e) and TBMP § 528.05 also make it clear that the proper procedure for submitting evidence against summary judgment is to produce affidavits (or declarations) that set forth specific *facts* showing a genuine issue for trial. Affidavits can be supplemented with “exhibits” only if the “exhibits” are identified in the affidavits.

¹ In fact, VTB submitted its Exhibit 16 that includes information that VTB refused to produce on the basis that it was too burdensome to compile because VTB “does not keep detailed computerized records concerning each item they sell.” *See VTB’s Exhibit 16* as compared to its response to Interrogatory 3(c), attached as BABW’s *Exhibit 17*. VTB’s newly produced exhibit appears to be exactly the kind of “detailed computerized record” that VTB refused to produce.

² BABW notes that VTB requested an oral hearing to any questions the Board has concerning discovery-related issues that Applicant may raise. *See VTB’s Response*, p. 3, *fn. 1*. BABW does not believe that such a hearing is necessary since BABW has also addressed the substance of the affidavits and exhibits.

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VTB's affidavits are replete with deficiencies further evidencing VTB's lack of facts supporting any trademark use of a heart design prior to February 13, 2004. Rather than submit appropriate affidavits with identification of facts and exhibits, VTB employs a "shotgun" approach. The affidavits state legal conclusions rather than facts. The affidavits do not identify the documents purported to be "exhibits." And, most important, the deficient affidavits fail to affirmatively establish use of a heart *as a trademark* rather than merely ornamental use.

a. The Affidavits Are Devoid of Any Facts Supporting VTB's Case and actually show that VTB's Heart is Ornamental

The affidavits of Mr. Burns and Ms. Robert do not identify a single instance where VTB used a heart as a source identifier, nor do they identify any instance where a customer actually identified the source based on the heart. Rather, the affidavits merely reiterate that VTB—at best—allowed customers to put a heart in a bear. There is no evidence demonstrating that VTB promoted the heart design *as a trademark* or that customers associated a heart with VTB. In fact, the only evidence of how VTB promoted a heart (the 1996 catalog) prominently shows the heart on a chain on the outside of a bear.

Significantly, Ms. Robert concedes that the heart is merely an "extension" of VTB's "Teddy and Theo" bears that featured an inscribed heart on a chain on the outside of the bears. Moreover, Ms. Robert plainly admits that VTB—to this day—believes that the three-dimensional heart is nothing more than a "component part" for its bears,³ stating:

"VTB extended the MAFFL concept (Note: where the heart was used as a pendant on a necklace) to kits including a blueprint bearing instructions for assembly of a teddy bear, with the kit **including all of the component parts necessary to assemble the bear including, initially, a brass heart with a hole in it, . . . VTB's trademark.**"
(Robert Affidavit, paragraph 7)(Emphasis and parenthetical note added).

Ms. Robert's admission is conclusive proof that VTB's use of a heart was never considered—even by VTB itself—to be anything more than another "component part" to assemble a bear. Put simply, VTB does not consider its use of three-dimensional heart to be any different than its use of a head, arms, and legs to assemble a teddy bear.

³ BABW notes that the Examining Attorney for the VTB application also noted that the blueprint and 1996 catalog relied upon by VTB merely show that the proposed heart mark is "used as one of the pieces of a kit for making a teddy bear and that it is not used as a trademark to identify the source." *Exhibit 6 from BABW's Memorandum in Support of Summary Judgment*. The Examining Attorney, like Ms. Robert, believed that the proposed heart mark was "merely a body part, like one of the bears legs or arms." *Id.*
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b. The Affidavits State Inadmissible Conclusions and Are Procedurally Deficient

Under Rule 56, affidavits must state specific facts that constitute admissible evidence. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 110 S.Ct. 3177 (1990). Mere conclusory allegations or statements of legal conclusions do not meet this requirement. *Id.* See also *Marshall v. East Carroll Parish Hosp. Serv. Dist.*, 134 F.3d 319 (5th Cir. 1998) and *BellSouth Telecomm., Inc. v. W.R. Grace & Co.*, 77 F.3d 603 (2d. Cir. 1996). Further, TBMP § 528.05 mandates that affidavits must identify the “exhibits” to be considered. TBMP §528.05(b). Documents not identified in the affidavit cannot be considered as exhibits. *Id.* Moreover, TBMP § 528.05 and Fed. R. Civ. P. 56(e) require that all statements must be based on personal knowledge.

The Burns and Robert affidavits are replete with mere legal conclusions that are inadmissible and should be completely disregarded. For example, Mr. Burns states:

“VTB continuously used the concept of placement of a heart within the chest of a bear *as a Trademark and Service Mark . . .*” (Burns Affidavit, Paragraph 15) (Emphasis added).

As a further example, Mr. Robert states:

“VTB’s customers could assemble a teddy bear including VTB’s *Trademark and Service Mark placement of the teddy bear’s heart* in its chest which mark VTB adopted and claimed as its mark . . .” (Robert Affidavit, Paragraph 6)(Emphasis added).

These statements attempt to invoke the legal conclusion that VTB used the heart “*as a Trademark and Service Mark.*” Yet no underlying facts are provided by which this Board could reasonably examine the alleged use. In the absence of specific facts demonstrating VTB’s use of the heart as a trademark, it cannot rely on mere conclusory allegations. *Id.*

In addition, the affidavits from both Mr. Burns and Ms. Robert contain other significant procedural deficiencies. The affidavits fail to identify a number of the “exhibits” that VTB attached to its response. In particular, there is no reference in the affidavits to the documents constituting Exhibits 3 through 12.⁴ The TBMP gives this Board the authority to disregard the exhibits that are not properly identified. TBMP § 528.05(b)

Moreover, with the lone exception of a single paragraph in Mr. Burns’ affidavit, neither the affidavit from Mr. Burns nor the affidavit from Ms. Robert identify the statements that are made on personal knowledge. The

⁴ BABW notes that the affidavit of Ms. Robert makes reference to photographs that were “attached to this Declaration.” However, no documents of any kind are attached to Ms. Robert’s declaration. Without some sort of identification, both BABW and this Board are left to search for these alleged photographs on their own—a result clearly disfavored under the Rules.

necessary implication is that only the specifically identified paragraph 15 from Mr. Burns is made based upon actual personal knowledge. Indeed, both affidavits contain numerous statements from Mr. Burns and Ms. Robert that cannot possibly be made on the basis of personal knowledge. For example, it is impossible for Mr. Burns and Ms. Robert to make statements with respect to the contents of each bear or kit based on personal knowledge unless they personally witnessed each transaction in a VTB store and personally witnessed each packaging of the kit. It is similarly impossible for Mr. Burns to have personal knowledge of any customer's state of mind to support his conclusion that "it was made clear to VTB's customers" with respect to a heart design. *See Sassafra Enterprises, Inc. v. Roshco, Inc.*, 915 F.Supp. 1, 8 (N.D.Ill. 1996)(statement in affidavit concerning state of mind of third-party consumers was inadmissible and stating that affiant would have to be a "mindreader").

The affidavits appear to rely on the "declaration" contained at the end of the affidavit that "statements made on information and belief are believed to be true." The United States Supreme Court found this reliance impermissible by stating that an affidavit made "on information and belief" does not meet the Rule 56(e) personal knowledge requirement. *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*, 339 U.S. 827, 831 (1950). If not based on personal knowledge, these statements are inadmissible and should not be considered by the Board pursuant to Fed. R. Civ. P. 56(e) and TBMP § 517.

II. VTB Fails To Adequately Distinguish The Wiley Case

A. As in Wiley, VTB Must Rely on Common Law Rights to Support its Position

First, VTB incorrectly attempts to distinguish *Wiley* on the basis that *Wiley* did not attempt to register its heart as a trademark, whereas VTB did apply to register. As noted by the court in *Wiley*, the plaintiff was required to rely upon "common law" trademark rights—if any. Because VTB does not have a registration and filed its application after BABW, VTB must also rely on common law rights. As such, *Wiley* cannot be distinguished by the mere act of filing a trademark application.

B. VTB's 1996 Catalog Neither "Advertises" nor Shows Use of A Trademark

Second, VTB incorrectly attempts to distinguish *Wiley* on the basis that *Wiley* did not have "advertisements" for its heart.⁵

⁵ BABW notes that VTB attempts to portray this catalog as both an "advertisement" as well as proof of use of a trademark. These positions are inconsistent given that "advertisements" are not proof of trademark use. TMEP § 904.05. In any event, the STLD01-1094897-1

TTAB precedent makes it clear that these catalog pages or “advertisements” are not proof of *use as a trademark*. VTB cannot dispute the statement of law from *In re Dimitri’s* that when the advertisement itself shows use of the design merely in an ornamental fashion; it does not promote the term as a trademark. *In re Dimitri’s*, 9 USPQ2d 1666 (TTAB 1988). Here, the catalog merely shows VTB’s decorative and ornamental use of a three-dimensional heart and, as a result, does not promote the design as a trademark.

C. VTB Offers No Facts or Law to Support Differentiation of Wiley

Lastly, VTB unsuccessfully attempts to distinguish *Wiley* on the basis that *Wiley* did not involve a heart *in* a bear—only a heart *on* a bear. VTB does not offer any cases or rules of interpretation as a basis for this reading of the *Wiley* case. In short, VTB has produced no evidence and no legal authority to distinguish *Wiley*. Instead, VTB offers mere conclusory allegations as their sole support.

For these reasons, *Wiley* is not distinguishable from the present case.

III. VTB Fails To Create An Issue Of Fact By Attempting To Show Trademark Rights Based On The Actions Of BABW

Having failed to proffer any admissible evidence, VTB attempts to establish an issue of fact by focusing on the purported actions of BABW. First, VTB attempts to show trademark rights in a heart design by an incorrect and improper reference to the BABW’s application for a heart—rather than VTB’s own alleged use. Second, VTB claims that BABW had an intent to copy the heart design⁶ and, as a result, the heart design is *automatically* a trademark. In support of this assertion, VTB cites *O&W Thum, Co. v. Dickinson*, 245 F. 609 (6th Cir. 1917). However, *Thum* does not support this proposition.

catalog most prominently displays a heart on a necklace—and includes reference to an interior page that also shows use on a necklace.

⁶ Contrary to VTB’s assertions, Ms. Clark’s deposition does not evidence any intent to copy VTB’s alleged heart. Rather, Ms. Clark testified only that she saw VTB’s 1996 Catalog with the Teddy and Theo Bears and the MAFFL Kit (which shows a heart on a chain on the outside of a bear and which was rejected by the USPTO as non-trademark use). Further, the testimony demonstrates that Ms. Clark did not review any instructions for the kit, but did recall that the kit contained a heart with a hole and a chain. See pgs. 31-33 of Ms. Clark deposition, VTB’s Exhibit 9. There is absolutely no evidence that she perceived the Teddy and Theo bears/MAFFL kit any differently from how VTB promoted it - as an ornamental necklace. Nor is this testimony any evidence of an alleged intent to copy an ornamental design.

In any event, while BABW had no intent to copy VTB’s heart or to pass itself off as VTB, even assuming the alleged intent for the purpose of this motion, it is completely irrelevant to the issues in the summary judgment motion and does not create any material issue of disputed fact as shown above.

1. BABW's Intent-to-Use Application Does Not Prove Trademark Use by VTB

VTB argues that the USPTO did not find the BABW trademark to be ornamental (and, therefore, the VTB heart should also not be ornamental). VTB's argument includes an incorrect statement of the facts. Contrary to VTB's assertion, the USPTO, quite properly, did not address the issue of ornamentation with BABW's application. TMEP §1202.03(e) explicitly states that the Examining Attorney should not address ornamentation for an intent-to-use application until specimens of use have been submitted. Therefore, since BABW's application was based on intent-to-use and BABW had not submitted specimens, the Examining Attorney could not have addressed the issue of ornamentation. As such, VTB's reliance on the BABW application is misplaced.

2. The *Thum* Case Does Not Propose Distinctiveness Based on an Alleged Intent to Copy

VTB cites the *Thum* case in support of the proposition that BABW intended to copy a heart design and, therefore, the heart design must *automatically* be distinctive and function as a trademark. *Thum* does not stand for this proposition.

The *Thum* case involved the infringement of a distinctive design mark. In *Thum*, the court simply considered intent to copy as a factor in the infringement analysis. The issue of intent was never addressed with respect to the distinctiveness of the mark. There was no question before the court in *Thum* as to whether the allegedly infringed design (already a registered trademark) functioned *as a trademark*. Therefore, the portion of *Thum* cited by VTB cannot stand for the position that mere intent to copy an ornamental, three-dimensional heart instantly renders that design distinctive.

3. The *McCarthy* Treatise Does Not Propose Distinctiveness Based on an Alleged Intent to Copy

Like VTB's reliance on the *Thum* case, the reliance on *McCarthy* is also misplaced. The actual text of the *McCarthy* treatise reads as follows: "When a *distinctive* symbol appears in use by a junior user, it suggests an inference of conscious imitation. . ."(emphasis added). *McCarthy on Trademarks* § 7:34. Thus, contrary to VTB's claim, *McCarthy* supports BABW's contention design must already be distinctive before protection as a trademark is appropriate.

4. Allegations of Copying are not Relevant to a Determination of Whether VTB Obtained any Trademark Rights Based on Its use of a Heart as Mere Ornamentation.

Any inferences or allegations of “copying” are irrelevant unless VTB can show protectable trademark rights in a heart design. *See Kellogg Co. v. National Biscuit Co.* 305 U.S. 111, 59 S.Ct. 109, 83 L.Ed. 73, 39 USPQ 296 (1938)(holding that defendant could “copy” the pillow-shape of shredded wheat since the plaintiff did not protect the shape by patent or trademark); *Compco Corp. v. Day-Brite Lighting, Inc.* 376 U.S. 234, 84 S.Ct. 779, 11 L.ed.2d 669, 140 USPQ 528, 140 USPQ 531 (1964)(holding that defendant could “copy” the design of a lighting fixture when the design was not protected by plaintiff.); *Sears, Roebuck & Co. v. Stiffel Co.* 376 U.S. 225, 84 S.Ct. 784, 11 L.Ed.2d 661, 140 USPQ 524 (1964)(holding that defendant could “copy” the unprotected design of a lamp pole). *See also Blau Plumbing, Inc. v. S-O-S Fit-It, Inc.*, 781 F.2d 604, 228 USPQ 519 (7th Cir. 1986).

The above-referenced cases plainly demonstrate that VTB’s argument completely misstates the law. Rather than attributing trademark significance to a design *solely* because it was copied, the law actually states that allegations of copying do not prove trademark significance. VTB has not shown that it achieved any trademark significance or trademark rights. Thus, any inference of “copying” is irrelevant to the determination whether VTB acquired any protectable interest in a heart prior to February 13, 1998.

CONCLUSION

For the foregoing reasons, VTB failed to demonstrate trademark rights in a three-dimensional heart and BABW is entitled to judgment as a matter of law.⁷

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⁷ VTB made the unusual request that the Board enter summary judgment *sua sponte* in its favor on the issue set forth in BABW's Motion for Summary Judgment - whether VTB's heart design is merely ornamental. VTB is not entitled to a *sua sponte* entry of summary judgment in its favor because VTB failed to present undisputed evidence demonstrating any non-ornamental, trademark rights in a heart design as a matter of law.
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CERTIFICATE OF MAILING and SERVICE

I hereby certify that this correspondence is being submitted via the Electronic System for Trademark Trials and Appeals on August 23, 2004. Further, The undersigned hereby certifies that the foregoing was served upon H. Jay Spiegel, H. Jay Spiegel & Associates, P.O. Box 11, Mount Vernon, Virginia 22121 via UPS (or equivalent courier) on this 23rd day of August 2004.

/s/ Michelle W. Alvey

EXHIBIT 16

CHART OF VTB EXHIBITS

Exhibit	Description	Comment
1	Blueprint from MAFFL “kit”	<ul style="list-style-type: none"> • Rejected as proof of use by the PTO Examining Attorney in VTB’s own application. • Displays “heart” in list of components along with “head”, “body”, “arms”, and “legs.” • No “heart” is actually shown or displayed on the document.
2	Ideas from Shadow Productions	<ul style="list-style-type: none"> • Does not show use as a trademark in commerce. • VTB does not allege that this proves use as a trademark—only proof of date of use. <i>See Burns affidavit</i>, ¶ 7. • Displays “heart” in list of contents along with “head”, “body”, “arms”, and “legs.” • No allegation or statement that this document reached any consumers. • Document produced by Shadow Productions, not VTB.
3.	Documents regarding Catalogs ¹	<ul style="list-style-type: none"> • Documents do not mention or reference a “heart.” • Documents do not address trademark use. • Not identified or authenticated by affidavits. • Not signed, verified or sworn.
4.	1996 Holiday Catalog	<ul style="list-style-type: none"> • Rejected as proof of use by the PTO Examining Attorney in VTB’s own application. • Picture of “heart” is as a pendant on a necklace. • No picture of “heart” in a bear—only on a necklace.
5.	Prints of VTB Website from 2002 and 2004	<ul style="list-style-type: none"> • Do not show use of a heart as a trademark prior to date of BABW’s application. • Copyright notice of first portion is from 2002. • Second portion has time stamp of 2004.

¹ Documents were not produced to BABW prior to this motion and still have not been produced. Further, these documents are not dated, signed, or otherwise authenticated. As such, these are of little, if any, evidentiary weight and would not be admissible at trial.

6.	File History for VTB Application	<ul style="list-style-type: none"> Documents show only the prosecution history of VTB application. Not offered by VTB as proof of trademark use.
7.	Printout of mark cited against VTB	<ul style="list-style-type: none"> Documents show only the prosecution history of VTB application. Not offered by VTB as proof of trademark use. (<i>See VTB Response, p. 11</i>).
8.	Printout of mark cited against VTB	<ul style="list-style-type: none"> Documents show only the prosecution history of VTB application. Not offered by VTB as proof of trademark use. (<i>See VTB Response, p. 11</i>).
9.	Deposition of Maxine Clark	<ul style="list-style-type: none"> Does not show or document use as a trademark by VTB and contains no admission of use by VTB as a trademark.
10.	Photographs ²	<ul style="list-style-type: none"> Do not show use of a heart as a trademark prior to date of BABW's application. The photos are not dated and have not been produced before VTB's response. VTB acknowledges only that these were in use as early as the filing date of VTB's application—which occurred AFTER the BABW application.³ Photographs still only show use of a mark in an ornamental fashion by VTB—as a “component” as indicated by Ms. Robert's affidavit.
11.	File History for VTB Application ⁴	<ul style="list-style-type: none"> Documents show only the prosecution history of BABW application and do not reference or concern use by VTB.
12.	Letter to Zainy Brainy	<ul style="list-style-type: none"> Documents do not show or demonstrate use of a heart as a trademark of VTB. Date of document is after date of BABW application and, thus, not relevant as to VTB's use prior to BABW application.

² These documents were not produced to BABW prior to this motion and still have not been produced. Further, these documents are not dated, signed, or otherwise authenticated. As such, these are of little, if any, evidentiary weight and would not be admissible at trial.

³ *See VTB's Response*, Footnote 3 regarding proposed declaration to the Patent and Trademark Office to state only that the alleged mark was in use as of the filing date of VTB's application. However, VTB's application date is several years after BABW's application filing date.

⁴ Applicant's Copy of the Response does not contain a specific reference to Exhibit 11. However, these documents appear to be in the place of where an Exhibit 11 would normally be positioned.

13.	Printout of information on other VTB trademark (Make a Friend for Life)	<ul style="list-style-type: none"> • Documents do not show or demonstrate use of a heart as a trademark of VTB. • References a separate VTB mark that is not relevant.
14.	Printout of information on other VTB trademark (Make a Friend for Life)	<ul style="list-style-type: none"> • Documents do not show or demonstrate use of a heart as a trademark of VTB. • References a separate VTB mark that is not relevant.
15	Printout of information on other VTB trademark (Make a Friend for Life logo)	<ul style="list-style-type: none"> • Documents do not show or demonstrate use of a heart as a trademark of VTB. • References a separate VTB mark that is not relevant.
16	Documents regarding sales	<ul style="list-style-type: none"> • Documents do not mention or reference a "heart." • Documents do not address trademark use. • Documents are not dated, authenticated, verified, or sworn by VTB.

EXHIBIT 17

Wayne, NJ (October 1999 - November 2000)
Northbrook, IL (September 1999 - November 2000)
Edina, MN (September 1999 - November 2000)
Newport Beach, CA (September 1999 - November 2000)
Thousand Oaks, CA (September 1999 - November 2000)

Concerning the identities of knowledgeable persons, Opposer further objects to this request as being oppressive and not likely to result in discovery of information relevant to the Opposition Proceeding. All current employees of Opposer are aware of the Factory Stores and the products they offer. Employees employed prior to 1998 are aware of Opposer's off-site stores. Concerning documents, relevant documents will be produced in response to document requests.

Interrogatory No. 3:

Identify each good or service with which Opposer has used Opposer's heart and for each such good or service state:

(a) The date(s) of first use with Opposer's heart, specifying for each use whether such use involved the use of a red felt heart, a brass heart, or both and whether such use depicted or provided for the use of the heart in connection with a chain, necklace or other device for hanging the heart;

(b) The date(s) during which such good or services have been offered;

[(c) The quantity and dollar value of the sales of good or services offered during each year since the first use of the heart;]

(d) The marketing area (by city, county, province, state or other political subdivision) in which the heart was used during each year since the first use of the heart, specifying for each area whether such use involved the use of a red felt heart, a brass heart, or both and whether such use depicted or provided for the use of the heart in connection with a chain, necklace or other device for hanging the heart;

(e) The marketing and distribution method by which the good or service was offered during each year since the first use of Opposer's heart;

(f) The identity of the person responsible for supervising the quality of the goods or services offered; and

- (g) The identity of all persons with knowledge and all documents relating to the quality control of the heart.

Response to Interrogatory No. 3:

Opposer incorporates its general objections. Subject to those objections, Opposer responds as follows using the same letters (a)-(g) as set forth in the Interrogatory:

(a) and (b) From July, 1996 to the present, MAKE A FRIEND FOR LIFE® bears have been sold in all retail stores open at various times. The hearts were made of either red felt or brass in 1996, and have been exclusively red felt since sometime in 1998. In addition, from Fall, 1996 through 1998, TEDDY & THEO finished bears were sold with a necklace carrying a brass heart. From Fall, 1996 through sometime in 1998, MAKE A FRIEND FOR LIFE® kits were sold via mail order. Although the brass hearts had a hole therethrough, they came with no rope and were accompanied with instructions to place the heart inside the bear.

(c) Opposer additionally objects to this Interrogatory as being unduly oppressive and burdensome. Opposer does not keep detailed computerized records concerning sales of each item they sell. While the information exists, it would require a lengthy period of time to cull through hundreds of thousands of records for each year in question in order to identify the pertinent records.

(d) Opposer has kept no records as to whether specific sales of stuffed teddy bears with a heart therein had a heart of brass or felt. However, the marketing area for TEDDY & THEO bears and MAKE A FRIEND FOR LIFE® mail order kits has been the entirety of the 50 States of the United States through use of catalogs. For example, the catalog in the Fall of 1996 that first showed the heart in the bear had a printing of about 1 million copies that were distributed throughout the 50 States of the United States. MAKE A FRIEND FOR LIFE® bears were also promoted in advertisements printed in various catalogs, in the years 1996-1999, which advertisements promoted